

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	CASE NUMBER 02-43841
HENRICKS COMMERCE PARK, LLC,	*	
	*	CHAPTER 11
	*	
Debtor.	*	HONORABLE KAY WOODS
	*	

ORDER DENYING MOTION TO ALTER OR AMEND

Before the Court are (i) Gary Gorski's Motion to Alter or Amend Judgement, Motion to Amend or Make Additional Findings of Fact and Motion for New Trial from the Order of Court Filed and Entered June 15, 2005 (the "Motion to Alter") filed by Gary Gorski ("Gorski"), the sole equity security holder of Debtor Henricks Commerce Park, LLC ("Debtor") and (ii) the Objection of the United States Trustee to Gary Gorski's Motion to Alter or Amend Judgement, Motion to Amend or Make Additional Findings of Fact and Motion for New Trial from the Order of Court Filed and Entered June 15, 2005 (the "UST's Objection").

The Motion to Alter, which was timely filed on June 27, 2005, asserts that it is made "pursuant to Federal Rules of Bankruptcy Procedure 9023 and 7052." See Opening Paragraph of the Motion to Alter. The Motion to Alter essentially rehashed the arguments previously raised before the Court in the pleadings and/or at the hearing on June 8, 2005, to consider the Motion for Payment of Equity Security Holder's Attorney's Fees as

an Administrative Expense for Making a "Substantial Contribution" to a Chapter 11 Case (the "Motion for Attorney's Fees"). The Motion to Alter requests the Court to (a) amend the June 15, 2005 Order denying the Motion for Attorney's Fees; and/or (b) "amend [sic] such additional findings of fact and conclusions of law as asserted in this Motion [to Alter];" and/or (c) grant Gorski a new trial or evidentiary hearing on the Motion for Attorney's Fees; and (d) other and further relief.

The UST's Objection states that Gorski, in the Motion to Alter, has not demonstrated any legal or factual basis for the relief requested. The UST's Objection argues that Gorski does not allege the discovery of any new evidence nor any intervening change in law. Nor does Gorski demonstrate that the relief sought will prevent a manifest injustice. In addition, the UST's Objection notes Gorski had opportunity to provide all legal and factual support for the Motion for Attorney's Fees prior to and at the June 8, 2005 hearing.

FED. R. BANKR. P. 9023 incorporates FED. R. CIV. P. 59, which provides, in relevant part:

Rule 9023. New Trials; Amendment of Judgments.

Rule 59 FR Civ P applies in cases under the Code, except as provided in Rule 3008.

Rule 59. New Trials; Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in

suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

FED. R. BANKR. P. 7052 incorporates FED. R. CIV. P. 52, which provides, in relevant part:

Rule 7052. Findings by the Court.

Rule 52 FR Civ P applies in adversary proceedings.

Rule 52. Findings by the Court; Judgment on Partial Findings.

(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
. . . .

FED. R. CIV. P. 60(b) enumerates reasons why the court may relieve a party from a final judgment or order. Gorski fails to allege that any of those specified enumerated reasons require that this Court grant his Motion to Alter. Instead, Gorski argues that § 503(b)(3)(D) and (4) do not require counsel to be disinterested in order for the court to allow reasonable compensation for professional services rendered on behalf of an equity security holder in a case where a "substantial contribution" was made. To the extent this is a new argument, Gorski misreads the Court's June

15, 2005 Order. The Court did not hold that an equity security holder's professionals must be disinterested in order to be awarded reasonable compensation under § 503(b)(3)(D) and (4); the Court held that by the express terms of the Motion for Attorney's Fees, the Brief in Support thereof and Gorski's sworn Affidavit, the Motion for Attorney's Fees sought compensation for attorney's fees Gorski incurred both in his capacity as sole representative of the Debtor and as sole equity security holder. There is no question that Debtor's counsel is required to be disinterested under § 327(a). The fact that Gorski used Simon and Short to perform legal services for himself in his individual capacity while simultaneously performing those same legal services for the Debtor does not remove the requirement of disinterestedness.

Gorski argues that the "common purpose" of the equity security holder and the Debtor should not be the basis for denial of the Motion for Attorney's Fees. It is not the fact that equity and the Debtor had a "substantial identity of interest" that compelled denial; it is the fact that Simon and Short performed legal services for and on behalf of the Debtor that required denial of that motion.

The Motion to Alter now tries to recast the roles of Porter Wright and Simon and Short, but this attempt to refashion the attorneys' roles does not constitute new evidence. At pages 9 - 11 of the Motion to Alter, Gorski argues that Porter Wright remained at all times as and acted as counsel for the Debtor and

at page 13, Gorski describes Porter Wright as "experienced and able." Contrast these statements with page 20 of the Brief in Support of the Motion for Attorney's Fees and paragraph 4 of the Gorski Affidavit in support thereof wherein Gorski alleges that he had no confidence in Porter Wright, and Gorski, on behalf of the Debtor, would only give his consent and authority to act to Simon and Short. Although the Motion to Alter is arguably inconsistent with the Motion for Attorney's Fees, Gorski does not present any new evidence (his current arguments merely contradict his prior Affidavit) that would compel additional findings or a new trial.

Gorski also argues that he was not afforded an evidentiary hearing and requests one "to establish the facts giving rise to allowance of the Motion [for Attorney's Fees]." Gorski never requested an evidentiary hearing on the Motion for Attorney's Fees and, at the conclusion of his counsel's presentation, the Court specifically asked if there was anything else that Gorski wanted to add to the record. Counsel did not indicate that he needed or desired to introduce evidence. Not only does the Motion to Alter not establish any new facts or arguments that were not presented to the Court either prior to or at the hearing on the Motion for Attorney's Fees, but Gorski's conduct constituted a waiver of an evidentiary hearing on such motion.

The bottom line is that Gorski does not believe the Court gave his arguments in the Motion for Attorney's Fees sufficient

weight since the Court ruled against him. This is not adequate reason to alter or amend the prior Order of the Court. The Court carefully considered the arguments made by Gorski in the Motion for Attorney's Fees and the presentation at the hearing. The Motion to Alter does not add anything new to the record. Accordingly, because Gorski has neither presented any new facts nor has he intimated that there has been a change in the law, the Motion to Alter is hereby denied.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was placed in the United States Mail this _____ day of July, 2005, addressed to:

HENRICKS COMMERCE PARK, LLC, c/o Gary Gorski,
P. O. Box 147, Mercer, PA 16137.

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